No. 82-994

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ROBERT WELCH, INC.,
Petitioner,

v.

ELMER GERTZ,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

ARGUMENT

I. INTRODUCTION

The Respondent's brief in opposition is little more than general assertions without citation to the decision below, case authority or the record itself. When the Respondent does attempt once to set forth a specific legal argument, concerning the standard for proving actual malice, he demonstrates that the decision below clearly conflicts with prior decisions of this Court (Opp. at 8-9 [1]), as is shown *infra.*

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[1] "Opp." refers to Respondent's Brief in Opposition.

II. THE ISSUES IN THE PETITION WERE PROPERLY RAISED BELOW

Without any analysis, the Respondent asserts *ipse dixit* that the issues in the petition were not raised below. (Opp. at 7-8.) Yet earlier in his brief, the Respondent admits that at trial the Petitioner raised the issues of the confusion of "the standards of negligence and actual malice; [and] that there was insufficient evidence to prove negligence, malice or actual damages." (Opp. at 5.) This admission, and even a perfunctory reading of the decision below, shows that Respondent's argument that the issues in the petition were not raised below is meritless.

Specifically, Questions 1, 2 and 3 raised in the petition each clearly relate to proof of actual malice, including the standard by which it must be proven. Moreover, the opinion below addresses each of these questions: Question 1, *Gertz v. Robert Welch, Inc.*, 680 F.2d 527, 537-38 (7th Cir. 1982) (App. 21a-23a [2]); Question 2, *id.* at 539 n. 19 (App. 25a n. 19); Question 3, *id.* at 538-40 (App. 23a-26a). Likewise, during the instruction conference, the trial judge stated that he "recognizes that the defendant objects to the opportunity for the jury to award punitive damages." (Tr. 650.)[3]

Question 4 relates to the evidence necessary to establish actual damages, which, as noted, Respondent admits in his brief was raised below. Again, the Court of Appeals

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[2] "App." refers to the Appendix to the Petition for a Writ of Certiorari.

[3] The Respondent is disingenuous when he argues that the Petitioner did not object to the actual malice instruction and thus to the possible award of punitive damages. (Opp. 3.) At that point the Petitioner had successfully urged that a conditional privilege was applicable and that it could be overcome only by a showing of actual malice. *Gertz v. Robert Welch, Inc.*, 680 F.2d at 534 (App. 13a-14a).

also considered this issue. *Gertz v. Robert Welch, Inc.*, 680 F.2d at 540 (App. 26a-27a).

With respect to Question 5, concerning application of the "law of the case," the Court of Appeals stated as follows: "Because the law of the case doctrine as it applies to this case is not merely advisory, but is binding on the court on remand, we deem it necessary to examine this issue." *Id.* at 531 n. 3 (App. 8a n. 3). Furthermore, the Court of Appeals held that "if Welch is correct about the law of the case issue, it would be dispositive of this case . . . ." *Id.* at 532 n. 4 (App. 8a n. 4).

Thus, all Petitioner's questions were raised below and Respondent's "waiver" argument is without foundation.

Lastly, the Respondent pointlessly argues about whether the article was defamatory. (Opp. at 11-12.) Regardless of whether portions of the article were defamatory, the issue is whether the Court of Appeals improperly relied on the author's political views as placing the publisher on notice that the author was supposedly unreliable, especially when the publisher agreed with those political views.

III. RESPONDENT REPEATEDLY HAS MISSTATED THE FACTS BELOW

Respondent accuses the Petitioner of having set forth a "distorted" version of the facts." (Opp. at 6.) As will be seen below, the one fact which Respondent offers, Mr. Stang's status as a freelance writer, is readily supported by the record, including the statements of Respondent's own counsel.

Respondent's brief, on the other hand, contains numerous misstatements of fact. He made these same misleading statements in his brief before the Seventh Circuit and has consistently done so throughout this litigation. Much of the Respondent's brief is keyed to these misstatements. However, for the sake of brevity, this reply refers only to five examples.

1. It is self-contradictory for the Respondent now to claim that Mr. Stang was not a freelance writer. (Opp. 6.) Until the second Court of Appeals found it necessary to call Mr. Stang the Petitioner's agent in an attempt to bolster its holding on actual malice, *Gertz v. Robert Welch, Inc.*, 680 F.2d at 539 n. 19 (App. 25a n. 19), the Respondent did not question Mr. Stang's freelance status. At trial, counsel for the Respondent put it well in arguing an evidentiary point:

> MR. GIAMPIETRO: . . . [T]hey have maintained that he [Mr. Stang] is totally free lance. He was off on his own, did whatever he did on his own . . . .
>
> I don't think that they have a right to go into anything that Mr. Stang did, other than the fact that he wrote the article.
>
> * * * *
>
> It seems to me it's highly prejudicial to the plaintiff for them to go into these things [the research material looked at by Mr. Stang] *because it's going to divert the jury from the issues in the case, which is the action of the defendant, not Mr. Stang.* (Tr. 464 (emphasis added).)[4]

2. Unable to point to any direct and competent evidence of damages, the Respondent has argued that Mr. Albert Jenner gave direct testimony about damage to Respondent's reputation. (Opp. at 12.) Mr. Jenner testified only that he had not read the article and did not know its contents (Tr. 149), but that he had overheard general con-

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[4] The trial court ruled that Mr. Stang could not be asked about the contents of any documents upon which he relied because that would divert the jury from its "mission in this case, and that is the question of determining whether any negligence existed." (Tr. 466.) The trial court specifically prohibited questioning directed to Mr. Stang's "thought process" (Tr. 467), which it clearly would not have done if that process were in issue. Under Herbert v. Lando, 441 U.S. 153 (1979), the "thought process" of any person claimed to have acted with actual malice must be the focus of a defamation trial, especially when, as here, punitive damages are sought.

versation from unknown persons at his "wife's parties" and elsewere that "[s]omething about Communism" had been said by "some magazine, or book, or I don't know what it was" and that the plaintiff "lost respect among the community generally." (Tr. 151-52.) Nevertheless, Mr. Jenner testified, the plaintiff's reputation among his friends remained high. (Tr. 151.) Such speculative testimony, which did not even identify the publication which Mr. Jenner claimed was the subject of the conversations he overheard,[5] clearly does not meet the standards of *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974) (*"Gertz I"*).

3. Respondent's assertion that Mr. Stanley told Mr. Stang that Officer Nuccio was being "railroaded" (Opp. at 4) is a gross distortion of the record. The cited testimony was that Mr. Stanley sent "Mr. Stang to Chicago to find out whether Mr. Nuccio was being railroaded" as several persons had indicated, which is quite a different thing. (Tr. 187-88, 417-18, 603-04.)

4. Petitioner denies that Mr. Stang's actions are relevant here, since he was a freelance writer and his actions thus are not attributable to the Petitioner. However, if they are to be considered, it must be noted that Respondent is incorrect in his argument that Mr. Stang was negligent because he never checked with Mr. Nuccio's attorneys or any other knowledgeable persons. (Opp. at 4.) In fact, Respondent's own counsel argued to the jury that Mr. Stang talked with "two of the lawyers involved in the case . . . the prosecutors," (Tr. 676), and the testimony was that Mr. Nuccio's lawyer told Mr. Stang that no one else would talk with him (Mr. Stang). (Tr. 611-12.)

5. Respondent also errs in stating that Mr. Stanley "rushed the article into print . . . contrary to the usual

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[5] For example, it may have been reports about this lawsuit rather than the *American Opinion* article which engendered the reported comments.

procedure . . . ." (Opp. at 4.) Mr. Stanley testified that there was nothing unusual about the way the article was edited or set into print (Tr. 107) and that he was not trying to meet a deadline because "[i]f we hadn't gotten it done in the time we got it done, why we would have held it . . . it's not the end of the world." (Tr. 108.)

IV. THE EXISTENCE OF ACTUAL MALICE MUST BE ESTABLISHED UTILIZING A SUBJECTIVE STANDARD

Respondent, in his opposing brief, correctly recognizes that an important issue in this case is whether an objective standard should be utilized in determining the existence of actual malice. However, he misunderstands the law. He states:

> Defendant's argument that this Court has mandated that actual malice must be judged by a subjective standard alone is a perversion of the holdings of this Court. It has never endorsed the approach . . . .

(Opp. at 8.)

In fact, that is precisely the approach endorsed by this Court. In *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968), this Court stated:

> [C]ases are clear that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant *in fact* entertained serious doubts as to the truth of his publication. (Emphasis added.)

In its first opinion in this case, this Court characterized *St. Amant* as "equat[ing] reckless disregard of the truth with *subjective* awareness of probable falsity." *Gertz I*, 418 U.S. at 335 n. 6 (emphasis added). And in *Herbert v. Lando*, 441 U.S. at 160, this Court stressed that "*New*

York Times and its progeny made it essential to proving liability that the plaintiff focus on the conduct and state of mind of the defendant." Thus, despite Respondent's contention, this Court has emphasized that actual malice must be judged by a subjective standard. This is what the court below failed to do, thus putting its decision in conflict with holdings of this Court.

As Respondent notes, mere "[p]rofession[s] of good faith," *St. Amant v. Thompson*, 390 U.S. at 732, will not suffice to prove lack of actual malice, but that is not the issue here. It is not statements of good faith by the editor that the second Court of Appeals ignored, but his *state of mind*, his conviction that he was dealing with an accurate, honest, reasonable author whose opinions were believable. The editor had no " 'obvious reasons,' " *Gertz v. Robert Welch, Inc.*, 680 F.2d at 538, in his *own* mind to doubt the article's or author's veracity, which is the *subjective* test of actual malice required by this Court and not considered by the court below.

V. THE DOCTRINE OF LAW OF THE CASE PRECLUDED RESPONDENT FROM ATTEMPTING TO PROVE ACTUAL MALICE

Respondent argues that the doctrine of law of the case does not apply here because, even if this Court held (as it did) that Respondent failed to prove actual malice, it did not foreclose Respondent's opportunity to prove it at the retrial. That is incorrect; this Court did foreclose that opportunity.

This Court has held that to be awarded punitive damages against a media defendant in a defamation action, a plaintiff must prove actual malice. *Gertz I*, 418 U.S. at 350. But since this Court also ruled that the actual malice standard was not applicable to this case, *id.* at 352, Mr. Gertz could not be awarded punitive damages. Therefore, remand could have been only for determining

the extent of both fault and actual injury,[6] elements peculiar to compensatory, not punitive, damages. If this Court believed Respondent had proved actual malice at the first trial, it would have reinstated the jury's award of $50,000. This would have been permissible because *Gertz I* stated that presumed damages could be awarded if actual malice were shown. *Id.* at 349. This is yet another indication that the Court held actual malice had not been proven at the first trial.

Mr. Gertz claims that if this Court did not intend to allow him to prove actual malice at the second trial, it would not have remanded. To the contrary, this Court specifically held that "the *New York Times* standard is *inapplicable* in this case." *Gertz I*, 418 U.S. at 352 (emphasis added). Thus, actual malice was not a factor on remand. That was the correct assessment before the second trial court held that the publisher's conditional privilege made it necessary for Mr. Gertz to prove actual malice in order to be awarded even compensatory damages, a holding acknowledged by the second Court of Appeals. *Gertz v. Robert Welch, Inc.*, 680 F.2d at 534 (App. 14a).

However, three courts—the first trial court, the first Court of Appeals, and this Court—all agreed that, despite being given every opportunity to do so, Mr. Gertz failed to prove actual malice on the publisher's part. Such a finding by this Court was binding on the second trial court and the second Court of Appeals. Since the court below agreed that " 'a mandate is controlling as to matters within its compass,' " 680 F.2d at 532 (App. 10a), under the doctrine of law of the case that finding should have been "dispositive of this case." *Id.* at 532 n. 4 (App. 8a n. 4).

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[6] "Because the jury was allowed to impose liability without fault and was permitted to presume damages without proof of injury, a new trial is necessary." *Gertz I*, 418 U.S. at 352.

CONCLUSION

For the foregoing reasons and those stated in the Petition for a Writ of Certiorari, the writ should be granted.

Respectfully submitted,

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